Supreme Court, U.S.
FILED
DEC 28 2000
OFFICE OF THE CLERK

No. 00-1011

IN THE

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The government's response to the petition for certiorari suggests that the Court should grant the petitions in both this case and in *St. Cyr* and that the two cases should be consolidated for briefing and argument. Alternatively, the government argues that if the Court decides to take only one case, then the petition in *St. Cyr* should be granted.

As set forth in the petition for certiorari, our position is that this case, not *St. Cyr,* provides the better vehicle for review of the jurisdictional issue. Accordingly, if the Court decides to grant certiorari on that issue, petitioners respectfully urge the Court to grant the instant petition and hold the petition in *St. Cyr*. Alternatively, as the government suggests, we agree that the Court could grant the petitions in *both* cases. However, petitioners strongly disagree with the government's suggestion that the cases be consolidated for briefing and argument. Instead, if review is granted in both cases on the jurisdictional issue, petitioners respectfully submit that there should be separate briefing on that issue, and, if review is granted on the merits issue as well, the two cases should be briefed separately and argued separately in tandem.

Because petitioners' position is set forth fully in the petition for certiorari, we make only the following points in response to the government's Brief for the Respondent ("Resp. Br.").

1. As a preliminary matter, petitioners note that the government errs in stating that we are independently urging the Court to grant certiorari to review the Second Circuit's interpretation of IIRIRA's jurisdictional amendments. Resp. Br. at 15-16. As we state in our petition, our contention is that *some* avenue of review must remain available for petitioners to raise their constitutional and statutory claims. Because the Second Circuit preserved

district court habeas jurisdiction over petitioners' claims, we do not object to the dismissal of the petitions for review, and thus, urge the Court to grant review of the Second Circuit's ruling in this case only if the Court decides to grant certiorari on the jurisdictional issues raised by this case and *St. Cyr.* Pets. Br. at 2-3, 7-8, 19-25.

2. If the Court decides that review of the jurisdictional issue is warranted, petitioners submit that this case is a better vehicle than *St. Cyr*. The instant case, by itself, would provide the Court with a complete vehicle to decide the entire jurisdictional issue, and therefore (contrary to the government's position) there is no need to grant certiorari in both this case and *St. Cyr* to resolve that issue.

Other than urging review of the merits (Resp. Br. at 20-22), which has no bearing on which case is the better vehicle for deciding the jurisdictional issue, the government offers two reasons for granting review in *St. Cyr* either in addition to or instead of this case. First, the government contends that the Court should take both cases because the availability of habeas corpus and petition-for-review jurisdiction are intertwined and should be considered together. Thus, the government asserts that the Court should grant review in both cases to "ensure that the Court has before it both a case that was filed in the district court and a case that was filed in the court of appeals. . . ." Resp. Br. at 18.

Petitioners agree that the availability of habeas corpus and petition-for-review jurisdiction are necessarily intertwined, as we fully set forth in the petition. Pet. Br. at 19-25. But, as we further explained in the petition, this case by itself provides a complete vehicle because the petitioners here *did* file both petitions for review in the court of appeals and habeas corpus petitions in the district court. Hence, the court of appeals exhaustively

addressed both avenues of jurisdiction in its opinion in this case and squarely held that petitioners could proceed in district court with their already-filed habeas corpus actions. And, as the circuit decision notes, Pet. App. 28a-32a, the government argued its full jurisdictional position in this case, namely that IIRIRA had repealed the district courts' habeas corpus jurisdiction, that the court of appeals lacked jurisdiction over petitioners' claims, and that judicial review of those claims was wholly precluded.

The government states that if the Court grants certiorari in this case alone, then the Court might choose to address only the petition-for-review aspect of the case and leave the availability of habeas corpus for another case. Resp. Br. at 19. Yet, significantly, given the fact that the petitioners in this case sought review in both the district court and the court of appeals, and the fact that the court of appeals' decision addresses both avenues of jurisdiction, the government does not suggest that the Court would be *unable* to reach both avenues of jurisdiction were it to take only this case. Indeed, the manner in which the government itself framed the question presented in this case makes clear that this case directly implicates *both* avenues of jurisdiction. *See* Question Presented in Brief for the Respondent (stating that question presented is "[w]hether the court of appeals correctly concluded that . . . it lacked jurisdiction on direct petitions for review over petitioners' challenges to their final removal orders, but that the district court had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241"). Thus, the government has offered no reason that a grant in *St. Cyr* is necessary to present the Court with the full jurisdictional issue.

3. Second, the government contends that if the Court is going to take only one case, *St. Cyr* is the better vehicle. The government makes that contention on the ground

that, in its view, the only circuit split concerns the availability of district court habeas jurisdiction because no circuit has thus far affirmatively exercised petition-for-review jurisdiction over the types of claims raised in this case and *St. Cyr*. Resp. Br. at 18-19. But that argument is contrary to the entire thrust of the government's petition in *St. Cyr*, which notes that the courts of appeals have treated the availability of petition-for-review jurisdiction as inextricably intertwined with the availability of habeas corpus jurisdiction. The Second Circuit found that habeas corpus remains available because the circuit's own petition-for-review jurisdiction was repealed by Section 1252(a)(2)(C). *See, e.g.*, Pet. App. 21a-22a, 28a-32a (opinion below). *See also Liang v. INS*, 206 F.3d 308, 312 (3d Cir. 2000), *petition for certiorari pending sub nom. Rodriguez v. INS*, No. 00-753 ("determination of our jurisdiction over the petitions for review is inextricably intertwined with the question whether the district courts have continued habeas jurisdiction"); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1136 (9th Cir. 2000) (stating that availability of habeas jurisdiction means that court "need not read any limitations into the provision that bars our jurisdiction over petitions to review removal orders against aliens convicted of certain crimes").

Given the necessary interconnection between habeas corpus and petition-for-review jurisdiction that the government itself stresses, it is artificial to contend that there is only a division among the circuits regarding the availability of habeas jurisdiction and to suggest that the disagreement regarding habeas review can be divorced from the issue of whether the courts of appeals continue to possess petition-for-review jurisdiction over the types of claims raised in this case and *St. Cyr*. The government has thus offered no reason why *St. Cyr* alone is a preferable vehicle for deciding the jurisdictional issue.

In light of the foregoing, petitioners submit that it is neither necessary nor preferable to grant review in both cases (or *St. Cyr* alone). There are, however, reasons *not* to grant in both cases. Petitioners submit that granting in this case alone is simpler and avoids potentially presenting the Court with ancillary issues that should be resolved by the court of appeals in the first instance. As set forth in the petition, *St. Cyr* potentially raises subordinate issues that would arise if this Court were now to conclude that the claims presented in this case and *St. Cyr* must be presented in a petition for review and cannot be raised in a habeas corpus action. Pets. Br. at 20 n.8, 23. Those issues, of importance in the *St. Cyr* context, would vary from circuit to circuit and would needlessly complicate the briefing at this stage. *See id.*

4. If the Court were, however, to grant the petitions in both this case and *St. Cyr*, petitioners oppose the government's suggestion that the two cases should be consolidated for briefing and argument. The government offers no reasons for such consolidation, and petitioners submit that numerous grounds dictate separate briefing. First, the cases were not consolidated in the Second Circuit. The cases were argued separately (in tandem) and, significantly, decided in separate opinions by the Second Circuit (with the court of appeals issuing its merits ruling in *St. Cyr* and its jurisdictional ruling in this case). Although there is overlapping counsel in the two cases, the aliens in each case also have separate individual counsel.

Second, because the cases arise in different postures, with the government petitioning in *St. Cyr* and the immigrants petitioning in this case, the sequence of the briefing in the two cases is different. If the cases were consolidated for briefing, then either the government or the aliens would be deprived of the opportunity to file

the opening and the reply brief, as each is entitled to do as the petitioner in the respective cases.

Third, this case and *St. Cyr* are in different postures because the petitioners here filed both petitions for review and habeas corpus actions whereas the alien in *St. Cyr* filed only a habeas corpus action. *St. Cyr*, therefore, raises ancillary issues that, as indicated above, are not present in this case. *See also* Pets. Br. at 20 n.8, 23.

Fourth, the central jurisdictional issue raised by this case involves questions of considerable complexity and importance, namely whether any court has jurisdiction to review petitioners' claims, and if not, whether IIRIRA's amendments violate the Constitution. If the Court were to determine that the merits retroactivity issue decided in *St. Cyr* also warrants review, then that would constitute a distinct reason for the cases to be separately briefed and argued. The merits issue was decided only in *St. Cyr* and is a separate question that is appropriate for full briefing and argument. Petitioners agree that the merits issue cannot be briefed in this case. However, if the merits were to be briefed in *St. Cyr*, then that case would not permit sufficient briefing on jurisdiction as well. Accordingly, if the Court grants review of both the jurisdiction and merits issues, petitioners respectfully submit that the principal jurisdictional issue should be briefed and argued in this case and the merits issues should be briefed and argued in *St. Cyr*.

For the foregoing reasons, petitioners respectfully submit (1) that this case is the better vehicle for addressing the jurisdictional issue, (2) that granting review in *St. Cyr* does not add to the presentation of the jurisdictional issue and may well present unnecessary ancillary questions, (3) that if the Court grants review of the jurisdictional issue in both cases, then the cases should be briefed separately, and (4) that if the Court were also to

grant review of the merits question in *St. Cyr*, then the jurisdictional issue should be briefed and argued in this case and the merits issue briefed and argued in *St. Cyr*.

Respectfully submitted,

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